United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1179

To be argued by
PAUL MARTIN WOLFF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BERNARD TOBIN, as father and next friend
of Donna Ellen Tobin, a minor,

Plaintiff-Appellee

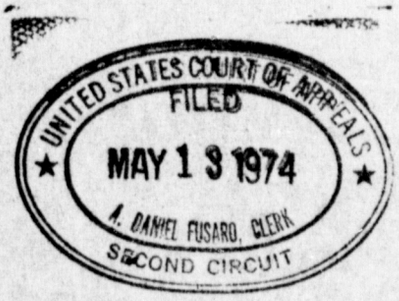
v.

BEN J. and JULIUS SLUTSKY, a partnership
doing business as Nevele Country Club

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE



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QUESTIONS PRESENTED

1. Whether the District Court erred in denying defendants' motion for a directed verdict.

2. Whether the District Court erred in granting at the close of the evidence plaintiff's motion for a directed verdict on liability.

3. Whether the District Court abused its discretion in refusing to set aside the jury's verdict on the ground that it was excessive.

STATEMENT OF THE CASE

Nature Of The Case

This case involves the plaintiff's charge that the defendants failed to provide his minor daughter decent and respectful treatment when she was a paying guest of the hotel owned and operated by the defendants. It arose out of an incident of July 11, 1970, where the plaintiff's daughter was accosted, assaulted and battered by an employee of the defendants.

Proceedings Below

The plaintiff, both individually and as father and next friend of his minor daughter, Donna Ellen, filed suit against the Nevele Hotel, Inc. ("Nevele"), Louis Employment Agency ("Louis"), and Ben J. and Julius Slutsky, a partnership doing business as the Nevele Country Club ("the Hotel") for the expenses incurred by him and the damage suffered by his daughter as a result of an incident on July 11, 1970 involving his daughter and an employee of the Hotel. The suit also sought punitive damages. At trial on December 12, 1973, the plaintiff dismissed his suit against the Nevele and Louis and his individual cause of action against the Hotel. (App. 51a, 54a) The case went to trial solely on the plaintiff's action on

behalf of his daughter against the Hotel. At the conclusion of the plaintiff's case, the District Court denied defendants' motion for a directed verdict as to liability and compensatory damages. It granted defendants' motion for a directed verdict with respect to punitive damages. (App. 156a-157a) Defendants rested without putting on any evidence. At the close of all the evidence the Court granted the plaintiff's motion for a directed verdict on the issue of liability. (App. 157a) The jury was then instructed on damages. After deliberating in excess of an hour the jury returned a verdict of $30,000 compensatory damages. (App. 183a, 185a) Judgment for the plaintiff as father and next friend of his minor daughter was entered against the defendants in the amount of $30,000 on December 18, 1973. Notice of Appeal was filed by the defendants on January 10, 1974. A Cross-Notice of Appeal was filed by the plaintiff with respect to that part of the judgment granting defendants' motion for a directed verdict on the issue of punitive damages. By Stipulation between counsel for plaintiff and defendants the plaintiff's Cross-Appeal was dismissed without cost in favor of either party as against the other.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF FACTS

On July 7, 1970, the plaintiff, his wife and fifteen-year-old daughter, Donna Ellen, arrived at the Hotel for a one-week vacation. (App. 67a) On July 11, 1970, at approximately 3 p.m., having just returned from horseback riding, Donna Ellen Tobin ("Donna Ellen") entered the building of the Hotel in which she had been staying with her parents so as to go to her room to change her clothes. (App. 85a-86a) While she was waiting in the lobby of the building for her elevator, Robert Stevens ("Stevens"), an employee of the Hotel who had been sitting in the lobby (App. 65a, 98a), came over and stood beside her.[1/] Donna Ellen got into the elevator and pushed the button for her floor. Stevens also entered the elevator, pushed a button for another floor, brandished a seven to eight-inch long knife and told Donna Ellen that if she said anything he was going "to slash" her throat. (App. 86a, 103a) The elevator did not stop at the floor for which Donna Ellen had pushed the button. Instead it proceeded to the top floor of the building. When it reached the top, Stevens, all the while

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1/ Stevens was "a big, husky man . . . sort of fat, [with] dark, wavy hair, dark complected, . . . and wearing a custodian's uniform . . . ." (App. 87a)

holding a knife on Donna Ellen, made her walk down the hallway toward a door. He opened the door with a key which he had in his possession and forced her out onto a cat-walk on the roof. (App. 88a, 90a, 105a) He proceeded to unbutton her shirt and tell her that if she attempted to stop him, he would kill her. Stevens then placed his hand inside her shirt and upon her body. (App. 90a, 112a, 115a) He next unzipped her pants. She attempted to get away, but was again told that if she tried to escape, he would kill her. (App. 92a) During this time Stevens continued to hold the knife at her throat. Stevens placed his hand down into her underwear and onto her body. (App. 92a, 115a) Stevens then unzipped his pants and exposed himself. (App. 92a) Only after Donna Ellen promised Stevens that she would not tell anyone about the incident did he allow her to leave the roof of the building. (App. 93a) Followed by Stevens, she then proceeded back across the roof to the hallway of the top floor of the building where she eventually found some stairs to which she ran so as to escape from Stevens. (App. 93a-94a)

ARGUMENT

I. The District Court Did Not Err In Denying The Defendants' Motion For A Directed Verdict.

At the close of the plaintiff's case the defendants moved

for a directed verdict. The motion was denied by the District Court. The Court did not err in denying such motion.[2/]

Defendants' contention that the District Court erred in denying their motion for a directed verdict is posited upon a misunderstanding of the applicable law. They misstated the law at the trial and they continue to do so in their brief to this Court. At the close of the plaintiff's case, the defendants moved for a directed verdict on the ground that Stevens was not acting within the scope of his employment when he assaulted Donna Ellen and that his acts had not been ratified or authorized by the defendants. (App. 152a-153a) Defendants' Brief at 7. They now expand their argument and contend that their motion should have been granted because the plaintiff failed to produce evidence from which the jury could have found that the defendants were negligent in either hiring or supervising Stevens. Defendants' Brief at 17-18.

The law setting forth the defendants' duty is clear. The defendants as owners and operators of the Hotel were

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2/ This Court need not reach the problem under Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) as to the applicable standard for granting directed verdicts because the New York rule accords with the general formulation. Noonan v. Midland Capital Corp., 453 F.2d 459, 461 (2d Cir.) cert. denied, 406 U.S. 945 (1972).

required to exercise for the safety, convenience and comfort of the plaintiff, his wife and daughter as paying guests reasonable care so that neither they nor their employees would "by uncivil, harsh or cruel treatment, destroy or minimize the comfort, convenience and peace" which the plaintiff, his wife and daughter would ordinarily enjoy if the Hotel were properly conducted. McKee v. Sheraton-Russell, Inc., 268 F.2d 669, 671 (2d Cir. 1951). The defendants' liability is in no way contingent upon a showing of negligent supervision or hiring or that Stevens acted within the scope of his employment. The Court in McKee, at 672, made this clear:

> "Is defendant liable for the bellboy's actions if these actions were not within the scope of his employment, and there is no showing that defendant ratified them, or no showing that the defendant was negligent in hiring or retaining him. The District Court held that liability can be imposed. We agree."

Thus the question for the District Court in passing on the defendants' motion for a directed verdict was not whether there was a prima facie case of negligent hiring or supervision or that Stevens had acted within the scope of his employment. The properly framed question is, was there evidence from which the jury could have concluded that the defendants failed to exercise reasonable care for the safety, convenience and comfort of the plaintiff, his wife and daughter.

The evidence detailing the attack on Donna Ellen was abundantly sufficient to allow the jury to infer that the

defendants had failed to exercise reasonable care. To wit, from the evidence of the incident, the jury could have reasonably concluded that such incidents do not in the ordinary course of events occur when those responsible use reasonable care and, a fortiori, concluded that the defendants failed to exercise reasonable care.

It was not necessary for the plaintiff to present evidence which showed what the defendants should have done to prevent the untoward conduct of Stevens. Nor was it even necessary for the plaintiff to present evidence from which the jury could have concluded what the defendants should have done in the exercise of reasonable care. The plaintiff satisfied his burden when he produced evidence from which the jury could have inferred that the defendants should not have acted as they did or that the defendants should have acted otherwise, although the specific manner remains unknown. Harper and James, The Law of Torts, 964-970. See also McCormick, Evidence, 2d ed., at 789-790; Restatement of Torts, 2d ed., § 285.

In McKee, supra at 671, this Court pointed out that the jury could have inferred lack of reasonable care from the fact that the bellboy who committed the acts upon the plaintiff had access to a key which allowed him to enter the plaintiff's room. In this case, similar evidence existed from which the

jury could have concluded that the defendants failed to exercise reasonable care. That is the evidence that Stevens had access to a key which allowed him to open the door to the roof where the incident took place. (App. 105a) Failure to exercise reasonable care could have also been inferred from any or all of the following circumstances: the possession of a knife by Stevens, Stevens' loitering in the lobby and public areas of the Hotel, and Stevens' access to the elevators used by paying guests of the Hotel. (App. 74a, 86a, 88a, 98a, 103a)

When he began working for the defendants, Stevens was briefly interviewed by a housekeeper. No attempt was made whatsoever to check into his background. The only person with whom the defendants discussed the suitability of Stevens for employment was Stevens himself. (App. 143a-145a) From this evidence the jury could have inferred that the defendants breached their duty of reasonable care by failing to check adequately into Stevens' background and to interview him fully prior to his employment.

The existence of evidence from which the jury could have inferred that the defendants failed to exercise reasonable care is further shown by the fact that the standard which the defendants must have met varied with the grade and quality of the accommodations they offered. McKee, supra at 671. The defendants' Hotel was at the time of the incident a first-class

hotel. The plaintiff paid approximately $500 for one week's accommodations for himself, his wife and daughter. (App. 69a) Furthermore, the Hotel, through its advertisements and brochures, presented itself to the plaintiff as a "family hotel" that provided "supervision, especially good for the children and teenagers." (App. 68a, 69a, 82a)

II. The District Court Did Not Err In Granting Plaintiff's Motion For A Directed Verdict On Liability At The Close Of The Case.

The defendants presented no evidence. After the defendants rested, the plaintiff moved for a directed verdict on the issue of liability. The defendants joined in the motion. The District Court then granted the motion, stating that the only thing to submit to the jury was the question of damages. After a recess the District Court permitted the defendants to withdraw their consent and over the defendants' newly-placed objection granted the motion for a directed verdict. (App. 151a-168a)

As with their own motion for a directed verdict, the defendants' objection to the grant of the plaintiff's motion was based on a misstatement of the applicable law. Again they contended that the plaintiff had to show that the acts of Stevens were done within the scope of his employment or "ratified or consented to or ordered" by the defendants. (App. 158a)

The directed verdict for the plaintiff was properly granted if (1) there was a complete absence of evidence to support a verdict for the defendants or (2) the evidence was so strongly and overwhelmingly in favor of the plaintiff that reasonable and fair-minded men in the exercise of impartial judgment could not have arrived at a verdict against the plaintiff. Sotell v. Maritime Overseas, Inc., 474 F.2d 794, 796 (2d Cir. 1973); Noonan v. Midland Capital Corp., supra; 5A Moore's Federal Practice, 2317-2320. And if a verdict for the defendants could have only been the product of surmise, speculation or conjecture and could not have been derived from fairly weighing the evidence, the District Court was correct in granting a directed verdict for the plaintiff on the issue of liability. Calvert v. Katy Taxi Co., 413 F.2d 841, 844 (2d Cir. 1969).

There is not one scintilla of evidence from which the jury could have concluded that the defendants exercised reasonable care. The defendants offered no evidence and there was nothing in the evidence presented by the plaintiff from which the jury could have inferred that reasonable care was exercised. In their brief the defendants do not point to any evidence from which the jury could have reasonably inferred without resort to guesswork that the defendants exercised

reasonable care. See Defendants' Brief at 10, 17.

III. The District Court Did Not Abuse Its Discretion In Failing To Set Aside The Jury's Verdict On The Ground That It Was Excessive.

In Dagnello v. Long Island Railroad Co., 289 F.2d 797 (2d Cir. 1961), Judge Medina in a lengthy and scholarly exposition discussed the power of this Court to review a District Court's refusal to set aside a verdict as excessive. Stressing that "the very nature of the problem counsels restraint," Judge Medina stated, at 806:

> "Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand. We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law."

The jury verdict awarding the plaintiff on behalf of his daughter $30,000 is not an amount for which it would be a denial of justice to permit it to stand. Rather the award is fair and when considered in light of the evidence presented, it is, if anything, low. Plaintiff will only point briefly to some of the evidence which fully justifies the jury's

verdict. A fifteen-year-old minor was taken at knifepoint on to the roof of the defendants' Hotel, where their employee unfastened her clothing and touched parts of her body, as well as opened his clothing and exposed himself, all the time threatening her with death if she made any attempt to escape.

Donna Ellen testified to the effect of the incident. She was crying and shaking, so scared that even when Stevens told her he would not allow her to leave until she stopped shaking, she could not control herself so as to stop shaking. (App. 110a) The incident remained firmly implanted in her mind over three years after its occurrence, as evidenced by the fact that during cross-examination by counsel for the defendants, Donna Ellen could not prevent herself from crying when asked to recount certain details of the incident. (App. 107a)

Granted that it is difficult to convert to a monetary figure the manner in which the actions of Robert Stevens injured and affected Donna Ellen. But that is the function of a jury. And the jury, upon proper instructions of the District Court, undertook this difficult task. Plaintiff submits that the figure it reached in no way is a denial of justice for the defendants and, accordingly, the District Court which observed Donna Ellen and was able to see how the events of July 11, 1970 affected her did not abuse its discretion when it denied defendants' motion to set aside the verdict as excessive.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

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Dated: May 6, 1974

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief For Appellee was mailed, first-class postage prepaid this 6th day of May, 1974 to McNulty & McNulty, 30 East 42nd Street, New York, New York 10017, attorneys for Defendants-Appellants.

Paul Martin Wolff